Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions of the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Deaveraged Rate Zones for Unbundled Network Elements	)	

OPPOSITION OF U S WEST COMMUNICATIONS, INC. TO MOTION FOR A STAY PENDING JUDICIAL REVIEW

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June 17, 1999

TABLE OF CONTENTS

SUMMARY

U S WEST Communications, Inc. ("U S WEST") hereby responds to the Joint Motion brought by MCI WorldCom, Inc. ("MCI WorldCom") and AT&T Corp. ("AT&T") seeking a stay of the Commission's May 7, 1999 Order, released in *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, FCC 99-86 (rel. May 7, 1999) ("Order"). U S WEST urges the Commission to deny the motion of AT&T and MCI WorldCom (collectively, "the Movants"). Because Movants ask for immediate implementation of a rule that has *never* been in effect, rather than the preservation of the *status quo*, a stay is not appropriate. Moreover, the Movants have not otherwise met the criteria for obtaining a stay. *First*, Movants will not prevail on the merits of their appeal. The Commission undeniably had the authority to postpone the effective date of the rule. Moreover, since the rule had not yet become effective, the Commission's action was not a suspension or otherwise a rulemaking subject to notice and comment requirements. Finally, contrary to Movants' assertions, the Order was not a deviation from its prior course, but even if it could be construed as such, the Order was the result of reasoned decisionmaking.

Second, Movants have not sustained their burden of demonstrating irreparable harm if a stay is denied. Instead, they make conclusory allegations that are simply not believable. Indeed, Movants' inflated assertion that state-wide average costs create an absolute barrier to entry into the residential market because such costs necessarily overstate the actual costs in urban

areas, is belied by the fact that Movants have made no effort to enter the residential market in rural areas, where state-wide average costs would necessarily understate actual costs. Moreover, Movants can cite to no authority for the proposition that the potential for not gaining (as opposed to losing) customers amounts to irreparable harm.

Third, other parties, including the states, will be harmed if they are forced to expend the resources necessary to immediately deaverage wholesale rates, only to revisit such issues when the Commission resolves universal service issues.

Fourth, contrary to the Movants' assertions, maximizing their profits is not a principle goal of the Act such that the public interest would be served by granting their motion. Rather, the public interest in promoting universal service (which the Commission's Order advances) far outweighs the Movants' private interests in maximizing their profits.

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OPPOSITION OF U S WEST COMMUNICATIONS, INC. TO MOTION FOR A STAY PENDING JUDICIAL REVIEW

U S WEST Communications, Inc. ("U S WEST") hereby responds to the joint motion brought by MCI WorldCom, Inc. ("MCI WorldCom") and AT&T Corp. ("AT&T") seeking a stay of the Federal Communications Commission's ("Commission") May 7, 1999 Order, released in *In re Implementation of the Local Competition Provisions of the Telecommunications Act of 1996,* CC Docket No. 96-98, FCC 99-86 (rel. May 7, 1999) ("Order"). U S WEST urges the Commission to deny the motion of AT&T and MCI WorldCom (collectively, "the Movants"). First, the Movants are not entitled to a "stay," since rather than requesting preservation of the *status quo*, Movants seek something more akin to a *writ of mandamus*, requesting immediate implementation of a rule that has *never* been in effect. Moreover, the Movants have not otherwise met the criteria for obtaining a stay. The Commission certainly had the discretion to postpone the effective date of one of its rules without notice and comment, where the rule had yet to take effect. The Movants have also failed to make even a

remotely credible showing of irreparable harm. For these reasons, as well as those set forth below, the Commission should deny the motion.

ARGUMENT

I. THE COMMISSION SHOULD DENY THE STAY BECAUSE MOVANTS SEEK NOT A PRESERVATION OF THE *STATUS QUO*, BUT RATHER IMPLEMENTATION OF A RULE THAT HAS NEVER BEEN IN EFFECT

A stay is only appropriate where the relief sought would maintain the *status quo*. *See McClendon v. City of Albuquerque*, 79 F.3d 1014, 1020 (10th Cir. 1996); *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977). In this case, however, the Movants do not seek to preserve the *status quo*, but rather seek implementation of a rule that has never been in effect. Indeed, although Rule 507(f) was slated to go into effect on September 30, 1996, *see* 61 Fed. Reg. 45476 (Aug. 29, 1996), the rule has either been stayed or vacated ever since.

First, the Eighth Circuit temporarily stayed the rule along with the other pricing rules on September 27, 1997 (i.e., prior to its effective date), and then stayed the rule pending a final decision on the merits. *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 421, 427 (8th Cir. 1996). Subsequently, the Eighth Circuit vacated the rule on jurisdictional grounds. *See Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800 n. 21 (8th Cir. 1997). Although the Supreme Court reversed this portion of the Eighth Circuit's decision, *AT&T Corp. v. Iowa Utils. Bd.*, 119 S. Ct. 721, 733 (1999), the Commission stayed the effective date of the rule in its May 7th Order before the rule was actually reinstated. Indeed, the Eighth

Circuit did not reinstate this rule until June 10, 1999. *See Iowa Utils. Bd. v. FCC*, No. 96-3321 (consolidated), slip op. at 1-2 (8th Cir. June 10, 1999).

In short, because Rule 507(f) has never been in effect, Movants' request for implementation of the rule should be denied because it does not seek to preserve the status quo.

II. THE MOVANTS ARE NOT ENTITLED TO A STAY BECAUSE THEY HAVE NOT OTHERWISE SATISFIED THE CRITERIA FOR A STAY.

A party is entitled to a stay only where it has shown that: (1) it will likely succeed on the merits; (2) it will suffer irreparable harm absent a stay; (3) that others will not be harmed if a stay is issued; and (4) the public interest justifies a stay. *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977) (citing *Virginia Petroleum Jobbers Ass'n v. FCC*, 259 F.2d 921, 925 (D.C. Cir. 1958)). The Commission should deny the request for a stay since the Movants have failed to sustain their burden of proof on all four factors.

A. The Movants Are Not Likely To Prevail On The Merits.

1. The Commission Had The Authority To Postpone The Effective Date Of Its Rule, Or Otherwise Stay This Rule.

The Commission had the authority to postpone the effective date of its rule, and nothing about its Order violates the Act or any other law. Agencies have the discretion to employ appropriate procedures, subject only to the constraints of the Administrative Procedure Act ("APA"), which establishes the "maximum procedural requirements" that courts may impose upon agencies. *See Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council,*

Inc., 435 U.S. 519, 524, 98 S. Ct. 1197, 1202 (1978). Where a rule has yet to take effect, nothing in the APA prohibits an agency from postponing the effective date of the rule. Indeed, in establishing an effective date, the only constraint imposed by the APA requires the publication of the rule at least 30 days before it becomes effective. 5 U.S.C. § 553(d). It cannot be disputed that the Commission met this obligation. Moreover, beyond the 30 day minimum, the APA leaves the publication period to the discretion of the agency.

Movants' entire argument that the Commission lacked authority to issue its May 7th Order is based on the false premise that the Order amounted to either a "suspension" or a "forbearance." *See* Joint Motion at 5-9. The Order was neither. First, the Commission in no way failed to apply the Act to any carrier or any geographic market; rather, the Commission simply postponed the effective date of a rule, which once effective, will apply universally absent a specific wavier. Similarly, the Order was not a suspension of Rule 507(f) since, as discussed above, the rule has never been effective. Accordingly, the dictates of 47 U.S.C. § 160 are simply irrelevant to this analysis.

Furthermore, the Commission has fully complied with the Act's implementation schedule. Indeed, the Act simply requires that the Commission "complete all actions necessary to establish regulations to implement the requirements of [section 251]" within 6 months of the Act's dated of enactment. *See* 47 U.S.C. § 251(d)(1). By establishing the regulations accompanying the *Local Competition Order* back in August of 1996, the Commission fully complied with this Congressional timetable for

implementation. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd. 15499 (1996).

The Commission's decision is easily justified in considering the burden imposed upon the states. At the time the Commission first promulgated the local competition rules, the states had commenced few, if any, arbitration proceedings to implement the Act. Accordingly, the Commission previously denied requests to stay its pricing rules, to ensure that its rules would be in place to guide the state commissions as they undertook to arbitrate interconnection agreements. Today, however, countless arbitrations have been completed by the individual state commissions. The states would be unduly burdened if they were required to *immediately* revisit their past arbitration proceedings and impose deaveraging, only to revisit those issues yet another time after the Commission completes its universal service proceedings. Accordingly, the Commission acted within its discretion in linking the effective date of Rule 507(f) to the resolution of universal services issues, and the Movants' reliance on the Commission's prior statements in initially denying a stay of its pricing rules is misplaced.

Finally, the Commission alternatively had the authority to postpone the effective date of Rule 507(f) because that rule is on appeal before the Eighth Circuit. Indeed, "[w]hen an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review." 5 U.S.C. § 705.

2. The Commission Was Not Required To Provide Notice And Receive Comments Prior To Postponing The Effective Date Of Rule 507(f).

In postponing the effective date of Rule 507(f), the Commission did not engage in rulemaking, and accordingly, the notice and comment requirements of the APA are inapplicable. Indeed, the Commission in no way altered the substance of the Rule; nor did the Commission fail to adhere to the standards of the Act in postponing the Rule's effective date. Accordingly, the Movants' mistakenly rely on *Environmental Defense Fund, Inc. v. Gorsuch*, 713 F.2d 802 (D.C. Cir. 1983) and *Council of the Southern Mountains, Inc. v. Donovan*, 653 F.2d 573 (D.C. Cir. 1981) as support for their assertion that the Commission's Order was subject to the APA's notice and comment requirements.

First, in *Gorsuch*, the Court found that the EPA's action in suspending the effective date of the rule after it had become effective, was "a suspension of a regulation without notice or comment in violation of the [APA]." *Gorsuch*, 713 F.2d at 804. Thus, unlike the instant matter, the action taken in *Gorsuch* occurred after the rule's effective date. Moreover, the authorizing statute in *Gorsuch* specifically provided that the regulations would take effect "upon a date certain by operation of law," specifically 6 months after the regulations were promulgated. *Id.* at 813 (citing 42 U.S.C. § 6930(b)). Since the Commission was not constrained by authorizing legislation requiring its rules to become effective by a date certain after their promulgation, *Gorsuch* is irrelevant here.

Similarly irrelevant is the *Donovan* case relied upon by Movants. There, the Secretary of Labor, without notice and comment, extended a rule's implementation date, even though the rule itself contained a date certain for when the rule was to be implemented. *Donovan*, 653 F.2d at 576-77. Clearly, an agency action that alters the substance of the rule itself is substantive rulemaking that ordinarily requires notice and comment. *Id.* at 580 & n. 28.

Because the Commission did not alter the substance of the rule, but merely postponed the effective date of a rule that has never been in effect, it did not engage in substantive rulemaking. Accordingly, the Commission was not bound by the APA's notice and comment requirements. Indeed, the Department of Justice has opined that an administrative agency may provide that a rule will become effective 30 days after promulgation, and subsequently take action to extend this period without notice and comment. *See* 5 Op.-O.L.C. 55 (1981) attached hereto.

3. The Commission's Postponement Of The Effective Date Was Not An Unexplained Reversal Of Course.

The Movants' assertions that the Order was an "unexplained reversal of course" or otherwise "fails the test of reasoned decisionmaking" should also be rejected. *See* Joint Motion at 11. First, the Order is not a deviation from the Commission's past positions. Indeed, the Commission in no way retreated from its position that the state commissions must ultimately implement zone

deaveraging.[1] But even to the extent that the Order can be construed as a deviation of course, the Commission adequately explained itself. Indeed, the Commission found "good cause" to postpone the effective date of its rule: (1) because the pricing rules have not been in effect for two-and-a-half years, and a stay would "ameliorate the disruption" of bringing states' rules into compliance; (2) because the stay will allow the states and the Commission a "sufficient, but not excessive, amount of time" to investigate the data accumulated since Rule 507(f) was first promulgated; and (3) to afford the states and the Commission the "opportunity to consider in a coordinated manner the deaveraging issues that are arising in a variety of contexts." Order at ¶¶ 4-6. This explanation obviously reflects a "reasoned analysis," which is all the law requires. *See Bush-Quayle '92 Primary Comm., Inc. v. Federal Election Comm'n*, 104 F.3d 448, 453 (D.C. Cir. 1997). Moreover, it may have been arbitrary and capricious for the Commission to ignore either the data

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[1] Moreover, U S WEST disputes that the cost-based rates for unbundled network elements ("UNE") mandate the three geographically deaveraged zones required by Rule 507(f). As one federal district court found:

> The legal question is whether the [state commission] based the price of unbundled network elements on cost. It did: average statewide costs. The more precisely one draws subdivisions, the closer one approaches the cost of providing service to an individual customer. Whether [a particular state] is divided into three zones or left as one, average cost is always a proxy for "actual" cost.

MCI Telecoms. Corp. v. U S WEST Communs., Inc., 1998 U.S. Dist. LEXIS 21585, *43 (W.D. Wash. July 21, 1998). To the extent that the Commission does impose deaveraging, however, U S WEST believes that it must refrain from doing so until state-implicit subsidies have been removed.

accumulated as a result of the passage of time, or the confluence of deaveraging issues.

B. The Movants Will Not Suffer Irreparable Harm Absent A Stay.

Movants offer nothing but conclusory -- and unbelievable -- allegations that they will be irreparably harmed absent a stay, thus falling far short of the necessary showing of harm that is "certain and great and of such great imminence that there is a clear and present need for equitable relief." *See Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 425 (8th Cir. 1996) (citations omitted). Movants make the incredible assertion that the inability to obtain deaveraged rates for unbundled network elements is an "absolute barrier to residential market entry," and that the failure to immediately require deaveraged rates will effect their competitive position for "years to come" since a launch date of any residential market offering will be 12 to 18 months from the date deaveraged rates are set. *See* Joint Motion at 17.

First, even if the Movants are correct in their assertion that "[i]n denser urban zones, state-wide averaging necessarily raises the cost of network element prices far above where they should be," Joint Motion at 16, the necessary corollary of this assertion is that in rural zones, state-wide averaging necessarily decreases the cost of network elements far *below* where they should be -- yet Movants have made no effort to take advantage of this cost disparity and serve those customers. This fact belies their assertion that state-wide averaged rates present an actual barrier to entry. Moreover, because retail rates in urban areas have not been deaveraged, prices (and therefore revenues)

are artificially inflated, and should offset the inflated costs. The Movants also offer no justification whatsoever for launch schedules that exceed 12 months.

Finally, the damages that Movants assert are sheer speculation. While in some circumstances the loss of customers or customer goodwill may suffice to demonstrate irreparable harm, *see Iowa Utils. Bd.*, 109 F.3d at 426, Movants can cite to no authority to support their contention that the possibility that they might not win customers constitutes irreparable harm.

C. Others, Including U S WEST, Will Be Harmed If A Stay Is Granted.

If the Commission's Order is stayed, harm will result to other parties, including U S WEST. Specifically, the states and other parties will be forced to waste significant resources in engaging in proceedings to deaverage, only to revisit such issues when the Commission completes its universal service proceedings.

D. Contrary To Movants' Assertions, The Public Interest Does Not Require That Their Profits Be Maximized.

In addition to its concerns that the various deaveraging issues be resolved in an orderly fashion, the Commission's Order was obviously concerned with promoting universal service, which is one of the principle goals of the Act. *See Local Competition Order,* 11 FCC Rcd at 15505 ¶ 3. Advancing universal service is without question in the public interest, and this public interest far outweighs the private interests of the Movants in maximizing their profits. Accordingly, the public interest favors denying Movants' motion as well.

CONCLUSION

For the foregoing reasons, the Commission should deny the Movants' request for a stay of the May 7th Order.

Respectfully submitted,

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Of Counsel,
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June 17, 1999

OPINIONS

OF THE

OFFICE OF LEGAL COUNSEL

OF THE

UNITED STATES DEPARTMENT OF JUSTICE

CONSISTING OF SELECTED MEMORANDUM OPINIONS
ADVISING THE

PRESIDENT OF THE UNITED STATES
THE ATTORNEY GENERAL
AND OTHER EXECUTIVE OFFICERS OF THE FEDERAL GOVERNMENT

IN RELATION TO

THEIR OFFICIAL DUTIES

EDITOR
Margaret Colgate Love

VOLUME 5

1981

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LEON ULMAN
Assistant Attorney General
Office of Legal Counsel

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Presidential Memorandum Delaying Proposed and Pending Regulations

The President has authority, under Article II, § 3 of the Constitution, to direct executive agencies to postpone proposed and pending regulations for a 60-day period.

Even where a regulation has been published in final form, the Administrative Procedure Act does not require an agency to follow notice and comment procedures in connection with a temporary postponement of its effective date, since such a postponement will not generally be regarded as a rulemaking. Even if it were so regarded, an agency will in general have good cause for dispensing with notice and comment procedures where a new President is assuming office during a time of economic distress.

January 28, 1981

MEMORANDUM OPINION FOR THE DIRECTOR, OFFICE OF MANAGEMENT AND BUDGET

The President is currently considering a series of measures to establish new procedures for the supervision of the regulatory process and the improvement of federal regulation. Among those measures is a proposed Memorandum to the heads of certain executive departments and agencies, directing a 60-day postponement in the effective date of pending and proposed regulations. This memorandum will discuss the legal basis for the President's directive and will outline the procedures for affected agencies to follow in complying with that directive.*

The President's authority to impose obligations of the kind included in the proposed Memorandum derives from his power to ensure that the laws are faithfully executed. U.S. Const., Art. II, § 3. This provision authorizes the President to supervise and guide executive agencies and officers in the execution of their responsibilities. As the Supreme Court stated in *Myers* v. *United States*, 272 U.S. 52, 135 (1926):

> The ordinary duties of officers prescribed by statute come under the general administrative control of the President by virtue of the general grant to him of the executive power, and he may properly supervise and guide their construction of the statutes under which they act in order to secure that unitary and uniform execution of the laws which Article II of the Constitution evidently contem-

*NOTE: The President's Memorandum, entitled "Postponement of Pending Regulations," was published on January 29, 1981, 46 Fed. Reg. 11227. Ed.

> plated in vesting general executive power in the President alone. Laws are often passed with specific provision for the adoption of regulations by a department or bureau head to make the law workable and effective. The ability and judgment manifested by the official thus empowered, as well as his energy and stimulation of his subordinates, are subjects which the President must consider and supervise in his administrative control.

In accordance with these principles, we believe that the President's authority to direct executive agencies to postpone proposed and pending regulations for a 60-day period, for the reasons stated in the Memorandum, is beyond reasonable dispute. *See generally* Bruff, *Presidential Power and Administrative Rulemaking,* 88 Yale L.J. 451 (1979).

The proposed Memorandum covers two major categories of regulations: those which have been proposed but have not been published in final form; and those which have been published in final form but have not taken legal effect. As to the first category, the Administrative Procedure Act (APA) imposes no special procedural requirements. The notice and comment procedures of 5 U.S.C. § 553 need not be followed, for nothing in that provision requires an agency to allow a period for comment on a decision briefly to delay final adoption of a proposed rule. However, the agency's decision may be subject to judicial review, and the agency may have to furnish a reasoned explanation for that decision. *See ASG Industries, Inc.* v. *Consumer Product Safety Commission,* 593 F.2d 1323, 1335 (D.C. Cir. 1979). The explanation here—that the new Administration needs time to review initiatives proposed by its predecessor—is, we believe, sufficient.

The second category of regulations covered by the President's Memorandum raises somewhat different legal issues. Under the APA, a substantive rule must be published "not less than 30 days before its effective date." 5 U.S.C. § 553(d). As the language and legislative history of this provision make clear, the 30-day period is a minimum, and agencies are generally free to delay the effectiveness of regulations beyond the 30-day period. *See Administrative Procedure Act—Legislative History,* S. Doc. No. 248, 79th Cong., 2d Sess. 259–60 (1946) (reproducing report of House Committee on the Judiciary); *id.* at 201 (report of Senate Committee on the Judiciary). The purposes of the 30-day delay in effective date are, first, to permit private parties to adjust their conduct in order to conform to new regulations and, second, to permit agencies to correct errors or oversights. *See id.* at 259–60, 359; Final Report, Attorney General's Committee on Administrative Procedure 114–15 (1941); *Sannon* v. *United States,* 460 F. Supp. 458, 467 (S.D. Fla. 1978). It is therefore plain that the APA permits an agency to adopt in the first instance an effective date provision extending beyond 30 days. We do not find anything in the language or legislative history of

§ 553(d) to suggest that agencies are forbidden to reach the same result by initially providing a 30-day period, and subsequently taking action to extend this period.

Nevertheless, it is necessary to consider what procedures an agency must follow in order to extend an effective date provision after the regulations at issue have been published in final form but have not yet become effective. For purposes of § 553, the issue is whether a suspension of the effective date of a rule is an "amendment" of the rule.[1] If so, notice and comment procedures or a finding of good cause to dispense with them are required before an agency may suspend the operation of a rule, and the regulations issued by the previous Administration will take effect before the new Administration has an opportunity to review them.

We believe that such a result would not comport with either the terms or the purposes of § 553. Therefore, we conclude that a 60-day delay in the effective date should not be regarded as "rule making" for the purposes of the APA. Although such a delay technically alters the date on which a rule has legal effect, nothing in the APA or in any judicial decision suggests that a delay in effective date is the sort of agency action that Congress intended to include within the procedural requirements of § 553(b).[2] This conclusion is supported by the clear congressional intent to give agencies discretion to extend the effective date provision beyond 30 days. The purposes of the minimum 30-day requirement would plainly be furthered if an extension of the effective date were not considered "rule making," for such an extension would permit the new Administration to review the pertinent regulations and would free private parties from having to adjust their conduct to regulations that are simultaneously under review.

We would note, however, that even if an extension of effective dates does not trigger notice and comment procedures, it may still be subject to judicial review under § 706. A statement of reasons for the deferral should therefore be provided. *See Action for Children's Television* v. *FCC*, 564 F.2d 458, 478–79 (D.C. Cir. 1977). For this purpose a reference to the President's Memorandum should be sufficient in most cases. The exception would be any rule for which the effective date has been a matter of controversy during the notice and comment period. In these

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[1] Under 5 U.S.C. § 553, notice and comment procedures must be followed for "rule making" unless "the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest." Under 5 U.S.C. § 551(5), the term "rule making" is in turn defined as "agency process for formulating, amending, or repealing a rule."

[2] Indeed, it is not clear that an agency is, as a general rule, required to provide an opportunity for comment on the intended effective date of a rule in the first instance. If agencies are not required to do so, a mere extension of that provision would not trigger the procedures of § 553.

cases, the explanation should refer to the specific considerations justifying deferral of the rule in question.[3]

Even if the suspension of a rule's effective date is regarded as rulemaking, we believe that agencies will in general have good cause for dispensing with notice and comment procedures. A new President assuming office during a time of economic distress must have some period in which to evaluate the nature and effect of regulations promulgated by a previous Administration. *Cf. Nader* v. *Sawhill,* 514 F.2d 1064 (Temp. Emer. Ct. App. 1975) (good cause for dispensing with notice and comment when increase in petroleum price necessitated by economic conditions); *Reeves* v. *Simon,* 507 F.2d 455 (Temp. Emer. Ct. App. 1974), *cert. denied,* 420 U.S. 991 (1975) (same conclusion for regulation issued during gasoline crisis); *Derieux* v. *Five Smiths, Inc.,* 499 F.2d 1321 (Temp. Emer. Ct. App.), *cert. denied,* 419 U.S. 896 (1974) (same conclusion for executive order freezing prices and salaries). If notice and comment procedures were required, the President would not be permitted to undertake such an evaluation until the regulations at issue had beome effective. A notice and comment period, preventing the new Administration from reviewing pending regulations until they imposed possibly burdensome and disruptive costs of compliance on private parties, would for this reason be "impracticable, unnecessary, or contrary to the public interest." 5 U.S.C. § 553(b)(3)(B). This rationale furnishes good cause for dispensing with public procedures for a brief suspension of an effective date.

For the foregoing reasons, we conclude that: (1) the President's Memorandum is a lawful exercise of his authority; (2) agencies need not allow a period for notice and comment on a 60-day suspension of the effective date of proposed regulations; and (3) at least in general, agencies need not allow such notice and comment for final but not yet effective regulations, and may comply with legal requirements with a simple statement incorporating the President's reasons for the proposed suspension.[4]

LARRY L. SIMMS
Acting Assistant Attorney General
Office of Legal Counsel

[3] If the effective date provision in a final rule has been the product of an agency resolution of a dispute among affected parties, the view that an alteration of the effective date is an "amendment" under the APA is of greater weight. Even in such cases, however, there may be good cause to dispense with notice and comment procedures. The explanation of specific considerations discussed in text above should suffice as a good cause statement even if the agency action is viewed as rulemaking.

[4] As indicated above, a more detailed explanation may be necessary when the effective date provision was itself a subject of controversy during the notice and comment period.

Proposed Executive

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*NOTE: Executive Order No. 12,29
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CERTIFICATE OF SERVICE

I, Rebecca Ward, do hereby certify that on this 17th day of June, 1999, I have caused a copy of the foregoing **OPPOSITION OF U S WEST COMMUNICATIONS, INC. TO MOTION FOR A STAY PENDING JUDICIAL REVIEW** to be served, via first class United States mail, postage prepaid, upon the persons listed on the attached service list.

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Rebecca Ward

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Last Update: 6/17/99